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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNION OIL COMPANY OF CALIFORNIA
and TOSCO CORPORATION,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTION PRESENTED FOR REVIEW

Where Congress directed the Department of Energy to adjust petroleum price controls in order to overcome regulatory disincentives for investments in tertiary crude oil recovery, was the Department authorized to continue its program of subsidies for these investments after decontrol removed all such regulatory disincentives? *

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* The parties in the proceedings below were Union Oil Company of California, Tosco Corporation, the Department of Energy, and James B. Edwards, Jr., Secretary of Energy. The list required by Rule 28.1 is set forth at the end of this petition.

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UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Union Oil Company of California ("Union") and Tosco Corporation ("Tosco") respectfully petition for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States to review that court's judgment of September 1, 1982, in *Union Oil Company of California v. Department of Energy, et al.*, No. 9-60, and in *Tosco Corporation v. Department of Energy, et al.*, No. 9-61.

OPINIONS BELOW

The opinion of the court of appeals is not yet officially reported and appears as Appendix A to this petition. The findings of fact, conclusions of law, opinions, and judgments of the district courts in *Union* and *Tosco* appear as Appendices B through F; the opinions are reported at 530 F. Supp. 717 (C.D. Cal. 1982) and 532 F. Supp. 686 (D. Nev. 1982). The order of the court of appeals deny-

ing Union's and Tosco's petitions for rehearing and suggestions for rehearing *en banc* appears as Appendix G. The court of appeals' order granting Union's motion for a stay pending application for review in this Court appears as Appendix H.

JURISDICTION

The court of appeals entered judgment on September 1, 1982, and denied the petitions for rehearing and suggestions for rehearing *en banc* of Union and Tosco on October 5, 1982. This Court has jurisdiction under section 211(g) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note (1976) (incorporated by reference in the Emergency Petroleum Allocation Act of 1973, as amended, Section 5(a), 15 U.S.C. § 754(a) (1976)), as further provided in 28 U.S.C. § 1254(1).

STATUTES AND REGULATORY MATERIALS INVOLVED

This case involves Sections 4(a) and 8(j)(1) of the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. §§ 753(a) and 757(j)(1) (1976); Executive Order 12287, 3 C.F.R. 124 (1982); Ruling 1981-1 of the Department of Energy, 46 Fed. Reg. 12945 (1981); and sections of the Mandatory Petroleum Price Regulations, 10 C.F.R. §§ 212.78 and 212.131 (1981). These provisions are reproduced in Appendix I.

STATEMENT OF THE CASE

Under a succession of statutes beginning in 1970,[1] Congress first authorized and then mandated that some

[1] Congress' principal enactments included the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 1468; Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627; Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (1975); Energy Conservation and Production Act, Pub. L. No. 94-385, 90 Stat. 1125 (1976). Congress also enacted numerous additional amendments, including one as late as June 30, 1980. *See* Energy Security Act, Pub. L. No. 96-294, 94 Stat. 611, 711.

domestic crude oil be subject to price ceilings and that the remainder be permitted to be sold at world market prices. The regulatory programs under these statutes were administered by the Department of Energy and its predecessor agencies ("DOE").[2] In 1976, Congress directed DOE to adjust its petroleum price controls in order to overcome regulatory disincentives for investments in tertiary crude oil recovery.[3] On January 28, 1981, President Reagan issued Executive Order 12287, eliminating "effective immediately" the "remaining Federal controls" on crude oil and other petroleum products, and thus ending eleven years of price regulation in the industry.[4] This case concerns the lawfulness of the DOE's subsequent "Ruling 1981-1." In that ruling, the DOE said that, in spite of decontrol, crude oil producers could obtain additional subsidies under the Department's "tertiary incentive program" if they made new investments in tertiary crude oil recovery during the two months following decontrol. App. 95a. If upheld, these subsidies will cost crude oil refiners nationwide $500 million or more.[5]

A. The Statutory Background and Ruling 1981-1

The DOE's authority to control the price of petroleum products originated in the Economic Stabilization Act of 1970,[6] an "emergency measure to counter severe infla-

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[2] For convenience, the Department and its predecessor agencies, the Cost of Living Council, the Federal Energy Office, and the Federal Energy Administration, are all referred to herein as "DOE."

[3] *See* page 4 & n.11 *infra*.

[4] App. 93a; 17 Weekly Comp. Pres. Doc. 53 (1981).

[5] Union made this estimate based on data provided to the district court. *See* Stipulated Record in No. 9-60, at 56-57, 334-37, 417-19, 546-47. DOE, which has the best available data, did not question the estimate there or in the court of appeals. *Cf.* App. 14a n.8.

[6] Pub. L. No. 91-379, 84 Stat. 1468.

tion that threatened the national economy."[7] The Arab oil embargo in 1973, with its attendant shortages of petroleum products and the four-fold increase in world oil prices, led Congress to enact the Emergency Petroleum Allocation Act of 1973 ("EPAA").[8] That Act required DOE to allocate crude oil and refined products, and to continue controls on prices. According to the Conference Report, the need to continue price controls stemmed from the shortages.[9] Congress also recognized that the authority granted to DOE could itself adversely affect crude oil supplies, and directed the President to "assiduously avoid that result."[10]

Congress retained price controls in subsequent amendments to the EPAA and, at the same time, displayed increasing concern over the adverse effects of its own regulatory program. Indeed, the basic aim of the 1975 amendments was to alleviate the adverse effect of price controls on domestic crude oil production. *FEA v. Algonquin SNG, Inc.*, 426 U.S. 458, 558 n.8 (1976). The following year, Congress took further steps to mitigate the regulatory disincentive to certain kinds of crude oil recovery. Among these steps, it authorized the "tertiary incentive program" at issue here, in order to avoid discouraging the recovery of oil from depleted wells through enhanced or "tertiary" recovery techniques which would otherwise be uneconomical under price controls.[11] Pursuant to Congress' directive to provide incentives "within the framework of the existing price regulatory

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[7] *Fry v. United States*, 421 U.S. 542, 548 (1975).

[8] Pub. L. No. 93-159, 87 Stat. 627, *codified in* 15 U.S.C. §§ 751 *et seq.*

[9] The continuation of price controls was intended to "prevent price gouging or price discrimination which might otherwise occur on the basis of the current shortages." H.R. Conf. Rep. No. 628, 93d Cong., 1st Sess. 26 (1973).

[10] H.R. Conf. Rep. No. 628, 93d Cong., 1st Sess. 14 (1973).

[11] *See* Energy Conservation and Production Act, § 122, Pub. L. No. 94-385, 90 Stat. 1125 (1976), *amending* EPAA § 8.

structure," [12] DOE in 1979 adopted regulations which permitted producers of crude oil to recover up to three-quarters of the cost of qualified tertiary project investments, by charging market prices for any oil otherwise subject to price ceilings. App. 96a-98a.

On January 28, 1981, Executive Order 12287 removed all of the regulatory disincentives to tertiary and any other domestic crude oil production, "effective immediately." Despite this instantaneous removal of the regulatory obstacle to tertiary investments, DOE's Ruling 1981-1 announced on February 12, 1981, that the tertiary program would continue for two full months after decontrol. The Department said that by investing in entirely new tertiary projects after decontrol, or making new investments in preexisting projects, producers would be able to obtain additional subsidies for their new investments by making retroactive increases in the price of oil sold before decontrol.[13] DOE's only apparent rationale for its Ruling 1981-1 was that it supposedly protected rights that had accrued to producers before decontrol under the DOE "certification" regulation.[14] App. 95a. The certification regulation, however,

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[12] S. Conf. Rep. No. 1119, 94th Cong., 2d Sess. 71 (1976).

[13] Three features of the tertiary program made it so attractive that some firms may have been reluctant to see it go, as shown by the briefs of *amici* below. First, the program permitted immediate reimbursement of "prepaid" tertiary expenses, even though the project might not begin immediately. *E.g.*, DOE Interpretation No. 1981-11, *Sun Oil Co.*, 46 Fed. Reg. 27293 (1981). Second, DOE permitted producers to claim tertiary incentives for expenses that were "paid" in interaffiliate transactions. *See* 46 Fed. Reg. 1246 (1981). Third, the program did not require a producer to recoup tertiary expenses through recertifications of oil that *he* had produced and sold as price-controlled crude oil; instead the producer could acquire an "interest" in someone else's previously-sold crude oil solely for the purpose of using it as the vehicle for recouping tertiary expenditures. *E.g.*, DOE Interpretation 1980-22, *Barber Oil Corporation*, 45 Fed. Reg. 61563 (1980); Stipulated Record in 9-60 at 352.

[14] In holding that Ruling 1981-1 was unlawful, the district court in *Union* went out of its way to make clear that its decision did not

had nothing to do with the purpose of the tertiary incentive program, *see* App. 6a, and DOE's litigation counsel promptly abandoned the "accrued rights" theory in the district court, suggesting that it may have been "technically inaccurate." [15] Ruling 1981-1 did not even mention the statute which authorized DOE to provide tertiary incentives or Congress' purpose in enacting it.

As the district court in *Union* observed, there was a "stampede" for tertiary benefits after decontrol, App. 50a, and the results of extending the tertiary program proved startling even to DOE. In response to complaints from refiners, DOE reconsidered Ruling 1981-1 about a month later, and found that a program which had been used only "moderately" during the period of price controls had suddenly assumed "phenomenal" proportions thereafter.[16] One hundred new tertiary projects were certified after decontrol,[17] as a program that previously served to mitigate a regulatory disability became an outright subsidy involving hundreds of millions of dollars.[18]

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cut off the rights of anyone who had already made tertiary investments and qualified for incentive benefits before decontrol. App. 53a, 68a.

[15] Brief of Department of Energy in *Union Oil Co. v. DOE*, 530 F. Supp. 717 (C.D. Ca. 1982), at 33 n.* (Sept. 16, 1981).

[16] 46 Fed. Reg. 17566 (March 19, 1981). Without mentioning any "accrued rights," DOE also tersely announced that crude oil producers could no longer rely on Ruling 1981-1 after March 19, 1981. *Id.* After subsequent rulemaking proceedings, DOE again changed course and ruled that producers could recover tertiary investments made between March 19 and March 31, 1982. 46 Fed. Reg. 36103 (July 13, 1981). DOE still did not explain how the congressional purpose justified Ruling 1981-1, although it promised to provide a "more extensive analysis" of its proceedings later; nearly a year and a half later, the analysis has not yet appeared. *Id.*; *see also* 46 Fed. Reg. 25315 (May 6, 1981); App. 14a-15a.

[17] General Accounting Office, Letter Report of September 29, 1981 at 1, Stipulated Record in No. 9-61 at 1873.

[18] *See* note 5 *supra*.

B. The Decisions of the District Courts

Union brought its action in the District Court for the Central District of California on April 22, 1981. The court granted Union's motion for summary judgment and explained its decision in both its Findings and Conclusions, App. 55a, and separate Opinion, App. 38a. After carefully reviewing the legislative history of the statute authorizing DOE to provide tertiary incentives, App. 46a-47a, 57a, 66a-68a, the court concluded that "the tertiary incentive program never was intended to enjoy a separate and independent existence apart from crude oil price controls," App. 46a, and that "Congress' purpose was limited to correcting the disincentive to tertiary production that had inadvertently been created by the then existing price controls." App. 66a-67a. The district court found that DOE had no authority to subsidize postdecontrol investments because "[o]nce price controls end, the need for a system of incentives designed to counteract some of the adverse effects of those controls also ends." App. 47a.

In a separate action brought by Tosco, the District Court for the District of Nevada upheld Ruling 1981-1.[19] App. 72a. Although Tosco briefed and argued the question of statutory authority (as did DOE), the court's memorandum decision and order did not address it.

C. The Decision of the Court of Appeals

The court of appeals heard the appeals in *Union* and *Tosco* together and upheld Ruling 1981-1.[20] In the court

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[19] The Nevada court sustained Tosco's separate challenge to provisions of the tertiary incentive program which permitted firms to recover expenses paid in interaffiliate transactions. The court of appeals reversed the district court on this issue, App. 32a-36a, but Tosco does not seek review of the question.

Both district court actions invoked the jurisdiction conferred by section 211(a) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note. *See* 15 U.S.C. § 754(a).

[20] The court received briefs from twenty-seven companies as *amicus curiae*. App. 19a n.10.

of appeals, DOE maintained that Ruling 1981-1 was lawful because Congress authorized it to provide tertiary incentives "by means of" price controls, not "because of" them; and it argued that Congress did not intend merely to reduce disincentives to tertiary recovery, but had the "broader purpose" of "maximizing" investments in tertiary projects.[21] The court of appeals found that Ruling 1981-1 provided additional incentives for producers to make additional tertiary investments after decontrol in February and March 1981. *See* App. 27a. This result, the court said, was authorized because the EPAA directed DOE to provide "additional price incentives" for tertiary investments. *Id.* Without discussing the legislative history, the court of appeals characterized both sides' claims regarding the evidence of underlying congressional intent as "plausible." App. 26a n.21. The court concluded that the "number of close questions" presented in this case should all be resolved by according "great deference" to the agency. App. 36a.

Union and Tosco filed timely petitions for rehearing and suggestions for rehearing *en banc* which the court of appeals denied on October 5, 1982. App. 89a. On October 12, 1982 Union filed a motion to stay issuance of the court's mandate pending application for review in this Court. The court of appeals granted the stay on the same day. App. 91a.

REASON FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED TO PRESERVE THE ROLE OF COURTS IN ASSURING AGENCY RESPECT FOR CONFLICTING CONGRESSIONAL GOALS IN REGULATORY LEGISLATION.

The court of appeals upheld DOE's authority to stimulate tertiary investments after decontrol simply because the DOE had provided "additional price incentives for" tertiary production. App. 27a, *quoting from* EPAA Sec-

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[21] Brief of Department of Energy at 30-31 in No. 9-60 (Mar. 2, 1982); *see also* App. 26a.

tion 8(j)(1)(A). That DOE did indeed provide incentives for new investments after decontrol is not in dispute; in fact, the district court in *Union* found that Ruling 1981-1 provoked a "stampede" for additional benefits. App. 50a. However, it is "fundamental that a section of a statute should not be read in isolation from the context of the whole Act." *Richards v. United States*, 369 U.S. 1, 11 (1962). The evident purpose of legislation permitting "price incentives" for some crude oil production was to strike a balance between the competing congressional goals of holding down crude oil prices and of minimizing disincentives to crude oil recovery. Although striking such balances is the substance of legislative policy choice, the court of appeals simply ignored the compromise that Congress achieved here. By adopting the agency's wholly one-sided claim that it had authority to "maximize" incentives for crude oil recovery, apart from the problem of price controls, the decision below undermines the role of the judiciary in assuring that agencies respect the boundaries established by Congress. The court's failure here to measure DOE's authority "by the purpose for which it was conferred," *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968), should not go unreviewed by this Court.

From the beginning, the price regulatory program was controversial, because within Congress "all were agreed on the need to control inflation but opinion was sharply divided on the optimum measures for the Government to use."[22] DOE's regulatory authority has always reflected Congress' concern with the adverse effects of the price ceilings it required, particularly as the economic emergency that prompted the program receded into the past. Debate over the wisdom of attempting to hold the line domestically against long term world economic forces provoked sharp debate—with epithets like "stupid and

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[22] *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 750 (D.D.C. 1971) (three-judge court).

ironic" [23]—because price controls decreased domestic production, thereby resulting in *upward* pressure on price and *increased* dependence on expensive imported oil.[24]

The recognition that price controls were both cure and disease was reflected in the early price ceilings which divided all domestic crude oil production into two categories—"old" oil, which was subject to price ceilings, and "new" oil, which was not.[25] Over time, Congress repeatedly modified this basic division by adding additional categories of crude oil to the list of those that warranted the incentive of market prices.[26] In result, the regulatory program became increasingly complex as Congress attempted to fine tune its machinery to minimize the coun-

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[23] 122 Cong. Rec. 8757 (1976) (remarks of Sen. Bartlett). Critics of the regulatory program argued that price controls were self-defeating, since every domestic barrel of oil that was too costly to recover at price controlled levels would simply be replaced by a barrel of foreign oil imported at world market prices. *See, e.g., id.*; 123 Cong. Rec. 36059 (1977) (remarks of Sen. Bellmon); 123 Cong. Rec. 36060 (1977) (Sen. Percy calling "such a policy . . . ludicrous"). *See also, e.g.*, 119 Cong. Rec. 17761-63 (1973) (remarks of Rep. Hansen).

[24] President Reagan adverted to this phenomenon when he removed all price ceilings, stating that the DOE program had been in effect a "subsidy for the importation of foreign oil." 17 Weekly Comp. Pres. Docs. 53 (1981).

[25] The first category consisted essentially of oil production at pre-existing production levels, while the second category encompassed production that exceeded pre-existing levels, and was therefore permitted to be sold at market prices as an incentive to increased production. *See* 6 C.F.R. §§ 150.353, 150.354 (1974).

[26] Thus, for example, Congress in 1973 exempted "stripper well" production from price ceilings, Pub. L. No. 93-153, 87 Stat. 576, 590, and later required DOE to take special account of the effect of price ceilings on "deep horizon development," properties north of the Arctic Circle or on the Outer Continental Shelf, "new wildcat properties," properties on which production was declining, and so forth. *See, e.g.*, 15 U.S.C. §§ 757(b)(2)(A), 757(b)(2)(B), 757(d)(3)(A) (1976).

terproductive effects of controls.[27] During the life of the program, the Temporary Emergency Court of Appeals accordingly maintained that no part of the program could be viewed in isolation from the entire problem addressed by Congress.[28] Here, however, the court of appeals turned the legislative scheme on its head by adopting DOE's view that Congress intended to "maximize" tertiary production. The court's elevation of one aspect of Congress' conflicting aims "to the level of a 'precept' is absolutely without support in the Act or its legislative history." *Consumers Union of the United States, Inc. v. Sawhill*, 525 F.2d 1068, 1079 (Em. App. 1975) (*en banc*).

The legislative history of the tertiary amendment makes clear, as the district court recognized in *Union*, that Con-

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[27] Even DOE's complicated entitlements program, which required the monthly transfer of hundreds of millions of dollars among hundreds of refiners nationwide, was authorized because Congress thought it "essential" to mitigate competitive inequities caused by the "two-tier" pricing system. *Pasco, Inc. v. FEA*, 525 F.2d 1391, 1402 (Em. App. 1975).

[28] Thus, for example, the court upheld a DOE program which provided financial incentives to producers of synthetic fuels, not because Congress ever specifically granted regulatory authority over that industry, but only because "the price and allocation system created adverse side effects," and benefits were therefore necessary to "minimize the adverse effects those regulations have . . . ." *Atlantic Richfield Co. v. DOE*, 655 F.2d 1118, 1121, 1125 (Em. App. 1981). Unlike the tertiary program, DOE cut off all nonvested claims under that program on the date of decontrol, on the ground that providing benefits after all disincentives had been removed would further "no discernible regulatory purpose." 46 Fed. Reg. 36080, 36082 (1981).

Similarly, the court of appeals reversed a district court decision on the scope of the "stripper well" exemption because of the district court's "total reliance on production incentives" and its "fail[ure] to adequately weigh [the legislative goal of lower crude oil prices which is] the other side of the coin." *In re the Department of Energy Stripper Well Exemption Litigation*, No. 10-39 (Em. App. 1982), Slip op. at 35. *See also, e.g., Standard Oil Co. v. FEA*, 612 F.2d 1291 (Em. App. 1979); *Mobil Oil Corp. v. DOE*, 610 F.2d 796 (Em. App. 1979), *cert. denied*, 446 U.S. 937 (1980).

gress never intended the program to have "a separate and independent existence" after decontrol. App. 46a. In the floor debates, the author of the amendment and every legislator who spoke in favor of the legislation made clear that Congress' purpose was simply to correct some adverse effects of Congress' own price control program. Senator Montoya sponsored the amendment to the EPAA authorizing tertiary incentives, and he made its limited objective plain.[29] When he introduced his amendment, Senator Montoya stated that "[t]he amendment . . . is an attempt to *unblock the road* toward full utilization of our domestic oil reserves. It is a way around *the problem presented by price controls* . . . ." 122 Cong. Rec. 18478 (1976) (emphasis added).

Those supporting the Montoya amendment also stated that they were acting to alleviate the effects of price controls. Senator Domenici, for example, said that the existence of price controls had prevented the marketplace from bringing about optimum secondary and tertiary production "because *the price that we have put on it* will just not pay for its extraction." *Id.* at 18479 (emphasis added). He thus told the Senate that the issue before it was whether to adjust the price controls to permit incentives immediately or wait an indefinite period of time until "there are no controls." *Id.*

Senators Glenn and Jackson strongly opposed the amendment, arguing that it was premature and would increase crude oil prices. *Id.* at 18481-82. In response, Senator Bentsen reemphasized the intent of the amendment's supporters only to overcome the investment disincentives imposed by controls:

> "For too long we have walked away from oil fields that we know contained oil. We walked away for one reason—because *artificial price controls* did not en-

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[29] As that of the sponsor, Senator Montoya's explanation "deserves to be accorded substantial weight." *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *see National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 640 (1967).

> able an individual to invest new money and improve his recovery techniques. . . . We must *remove the artificial restraint* that is preventing [tertiary] recovery. Senator Montoya's amendment would have the effect of removing these restraints. . . . We will never enjoy its benefits if we continue to frustrate its recovery by *restrictive, artificial price controls.*" *Id.* at 18487 (emphasis added).

Senator Bentsen also stressed that the amendment would not create any windfalls for producers. "We are not talking about increasing anyone's profit. We are talking about *letting the market work* and enabling an individual to invest in enhanced recovery techniques." *Id.* (emphasis added). Senator Montoya's bill was passed by a vote of 58 to 35. *Id.* at 18493.

The Conference Report, the "most dependable" indicator of Congress' intent,[30] reconfirmed that DOE was not authorized to stimulate investments after decontrol but only "within the framework of the existing price regulatory structure." S. Conf. Rep. No. 1119, 94th Cong., 2d Sess. 71 (1976). Indeed, the conference committee deliberations resulted in additional compromise between those who favored lower crude oil prices and those who favored decontrol, as Senator Montoya's bill was pared back to encompass only tertiary, and not secondary, recovery techniques. *Id.* The conferees reported that the amendment was intended to provide "additional price incentives to those extraordinary and high-cost enhancement techniques commonly associated with tertiary applications which are *uneconomical under today's pricing regimen.*" *Id.* (emphasis added).[31]

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[30] *North Haven Board of Education v. Bell*, 102 S. Ct. 1912, 1932 n.11 (1982) (dissenting opinion of Justice Powell).

[31] Until it issued Ruling 1981-1, even DOE agreed that tertiary incentives were appropriate only on account of the "pricing regimen" that existed under controls. In an early rulemaking notice, DOE specifically recognized that the legislative intent was not to provide incentives for all tertiary techniques, but only those "which would not and could not reasonably be expected to be undertaken under the present pricing regime." 42 Fed. Reg. 2646, 2653 (1977). And it declined to provide incentives for tertiary techniques not

In the light of what Congress actually said, the "interpretation" of congressional intent invoked by DOE and accepted by the court of appeals is untenable. The view that Congress authorized tertiary incentives in order to maximize tertiary investments, rather than merely to alleviate the adverse effects of price controls on those investments, miscontrues eleven years of congressional action in this area, and is at odds with everything Congress said about the specific program at issue here. There is, moreover, no basis in this Court's decisions for the court of appeals' "deference" to an agency view of its authority that was first advanced by the agency's litigation counsel.[32] And, especially in the context of complex regulatory legislation with conflicting aims, the adoption by the court below of DOE's "plausible" reading of the legislative history, because it was the view of DOE, App. 26a n.21, 36a, rather than a "plausible" reading that said exactly the opposite, App. 26a n.21, was an abdictation of the judicial role.[33]

The function of judicial review is to ensure that policy choices reflect those of accountable legislators, and not merely those of unelected administrators. At the heart of this proposition is the fact that legislation reflects compromise among "multifaceted points of view." *FPC v. Texaco, Inc.*, 417 U.S. 380, 400 (1974). Sometimes the congressional compromise, even when strong competing interests are at stake, is so decisive that a single objective may be paramount. Where that is so, this Court has

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shown to be "uneconomical at all controlled price levels under present conditions . . . ." *Id.* When it issued the final regulations, the agency reiterated that the tertiary program was intended to stimulate an "increased level of activity, *during the period of crude oil price controls* . . . ." 44 Fed. Reg. 51148 (1979) (emphasis added).

[32] *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 628 (1971).

[33] This Court has long recognized that an agency "may not finally decide the limits of its statutory power." *Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946).

not permitted an agency to upset the compromise even for compelling countervailing considerations, because those considerations have already been heard and the balance struck. *TVA v. Hill*, 437 U.S. 153 (1978); *FPC v. Texaco, Inc., supra.* On the other hand, if the compromise struck by Congress expressly requires the agency to preserve conflicting goals, the same rules of judicial review require that an agency not be permitted to elevate one aspect of the compromise to the level of a "precept." *See Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980); *Consumers Union of the United States, Inc. v. Sawhill*, 525 F.2d 1068, 1079 (Em. App. 1975) (*en banc*); *cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).[34]

In this case, DOE's one-sided view that the EPAA gave it a mandate to "maximize" tertiary crude oil investments led it to continue, after the removal of price controls, a program of subsidies that was authorized and designed solely to relieve crude oil producers from the burdens of those controls. In doing so, DOE ignored the fundamental congressional concern over the proper limits of its price control authority and went beyond what even the most ardent congressional proponents of price deregulation ever hoped for—or tried to achieve through legislative compromise. For an agency to ignore the context of debate from which its mandate derives, as the DOE has done here, simply exploits as if it were a weakness the fact that congressional enactments require the reconciliation of sharply divided factions. By the same token, judicial deference to such action diminishes the very thing that gives legislation its stature.

Especially as the regulatory programs which Congress authorizes become increasingly complex, and embody multiple policy objectives, it becomes increasingly difficult to ensure that the agency with delegated authority will

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[34] "Where Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant" to infer new rights "that, while serving one legislature purpose, will disserve the other." 436 U.S. at 64.

stay within its bounds. This recognition has, in recent years, led to escalating use of mechanisms like the legislative veto, and to calls within Congress for a more intensive standard of judicial review.[35] Preservation of Congress' policy choices through judicial review may be especially critical if, as the United States Court of Appeals for the District of Columbia Circuit has held, use of the one-house veto is unconstitutional.[36]

There is widespread recognition now that legislative programs do not achieve desired results without costs; regulation creates its own problems,[37] as this case per-

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[35] *E.g.*, McGowan, "Congress, Court and Control of Delegated Power," 77 Colum. L. Rev. 1119 (1977); S. Rep. No. 305, 97th Cong., 1st Sess. 89-91 (1981) (recommending legislation which would generally foreclose judicial reliance on an agency interpretation of its statutory authority); H.R. Rep. No. 435, 97th Cong., 2d Sess. 74-75 (1982) (same).

[36] *Consumer Energy Counsel of America v. FERC*, 673 F.2d 425 (D.C. Cir. 1982), *appeal docketed*, 51 U.S.L.W. 3099 (U.S. Aug. 2, 1982). That case involved the phased deregulation of natural gas required by the Natural Gas Policy Act of 1978. Like the EPAA, that legislation involved "hotly disputed" questions "centering on proposals for price deregulation," *id.* at 435, and thus, also like the EPAA, sharply raised the question whether the administrative agency would stay within the bounds of a legislative compromise that had been reached with difficulty. *See also Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), *cert. granted*, 102 S.Ct. 87 (1981), *restored for reargument*, 50 U.S.L.W. 3998.27 (U.S. July 2, 1982).

[37] The "regulatory reform" bills currently being debated in Congress would require additional procedures by which agencies evaluate the costs of regulatory programs. *See, e.g.*, 128 Cong. Rec. E4162 (daily ed. Sept. 15, 1982) (extension of remarks by Rep. Derwinski). *See also, e.g.*, Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164; Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812; Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705; Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793; Executive Order 12291, 3 C.F.R. 127 (1982) (President Reagan's program for agency identification of unnecessary regulatory programs); Executive Order 12044, 3 C.F.R. 152 (1979) (steps by President Carter to curtail overregulation); 11 Weekly Comp. Pres. Docs. 49 (1975) (President Ford proposing decontrol of petroleum industry in State of the Union message).

fectly illustrates. Here, Congress for eleven years attempted to strike the proper balance between alleviating abnormal economic hardships and the need for return to a free market environment. To achieve that balance, Congress gave DOE a complex mandate to alleviate some of the adverse effects that Congress specifically identified, including the effects of price controls on tertiary production. DOE's Ruling 1981-1, however, turned Congress' compromise into a $500 million subsidy program with a life of its own. By sustaining DOE's claimed authority to provide outright subsidies after decontrol—an authority not envisioned on *either* side of the debate about price controls—the decision below poses broad threats to the heart of legislative compromise. The decision warrants review by this Court.

CONCLUSION

For the reasons stated, the Court should grant the petition for a writ of certiorari to the Temporary Emergency Court of Appeals of the United States.

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LIST PURSUANT TO RULE 28.1

Union Oil Company of California and Tosco Corporation have no parent companies. Below is a listing of all companies (other than wholly owned subsidiaries) in which Union or Tosco has an ownership interest exceeding five percent.

Union Oil Company of California:

Ace Gas, Inc.; Adobe Canyon Corporation; Alfa-Oeste Empreendimentos Participaoe. E Servicos S/C Ltda.; Badger Pipe Line Company; Brea Agricultural Service, Inc.; Chem Central Corporation; Chicap Pipe Line Company; Companhia Brasiliera De Metalurgia E Mineracao; Cook Inlet Pipe Line Company; Cymoly Corporation; Everglades Pipe Line Company; Gravcap, Inc.; Gravity Adjustment, Inc.; Inland Corporation; International Speedway Corporation; Kyung in Energy Company, Ltd.; Los Angeles Oil Company; Miami Valley Corporation; Mid-County Chemical Company; Midwest PMS, Inc.; Minera Unionoil Chile, Ltda.; Moreland/Tarnutzer-Hamilton; Moreland/Warmington; Moreland/Hapsmith Partnership; Moreland/John Martin Company; Moreland/Pulley; Oil Shippers Service, Inc.; P-M-S West, Inc.; Platte Pipe Line Company; Quebec Columbium, Ltd.; Sam Bo Real Estate Company, Ltd.; Sanitation, Inc.; Sepulveda Oil and Gas Company; South Saskatchewan Pipe Line Company; Southcap Pipe Line Company; Superior Deshler Company; Tecumseh Pipe Line Co.; Union/Westates Partnership; UNOCO (Philippines), Inc.; USZ Associates; USZ Hotel Venture; Van Salt Water Disposal Company; W. Cam. Blk 595; West Texas Gulf Pipe Line Company; West Shore Pipe Line Company; Wolverine Pipe Line Company; Yellowstone Pipe Line Company.

Tosco Corporation:

Applied Molecular Genetics Inc.; South Central Oil Company; Whiting Petroleum Corporation.